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FIRST GENERAL COUNSEL'S REPORT

MUR 6196

DATE COMPLAINT FILED: June 5, 2009
DATE OF NOTIFICATION: June 12, 2009
DATE OF LAST RESPONSE: August 21, 2009
DATE ACTIVATED: August 18, 2009

STATUTE OF LIMITATIONS: May 19, 2014

15 COMPLAINANT: Brian P. Daley
16 RESPONDENT: Christopher G. Kennedy
17 RELEVANT STATUTES: 2 U.S.C. § 431(2)
18 2 U.S.C. § 432(e)(1)
19 11 C.F.R. § 100.72
20 11 C.F.R. § 100.131
21
22 INTERNAL REPORTS CHECKED: Disclosure Reports
23
24 FEDERAL AGENCIES CHECKED: none
25

26 I. INTRODUCTION

27 The complainant alleges that a newspaper "article" provides information
28 indicating that Christopher Kennedy became a federal candidate for the 2010 Democratic
29 nomination for the U.S. Senate for the State of Illinois and failed to designate a principal
30 campaign committee with the Commission in violation of 2 U.S.C. § 432(e)(1) of the
31 Federal Election Campaign Act of 1971, as amended ("the Act"). The response
32 maintains that the complaint relied on false information and that Mr. Kennedy was never
33 a federal candidate. On the contrary, according to the response, Mr. Kennedy was merely
34 testing the waters and had not made a decision regarding a potential senatorial run at the

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1 time the complaint was filed. Further, a supplemental response indicates that
2 Mr. Kennedy announced that he would not enter the senate race. Based on the complaint
3 and responses, we recommend the Commission find no reason to believe a violation
4 occurred and close the file.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 Brian Daley filed a complaint alleging that a newspaper "article" published May
7 19, 2009 provided information indicating that Christopher G. Kennedy intended to seek
8 the Democratic nomination for the U.S. Senate for the State of Illinois. According to
9 Mr. Daley, the same "article" in the *Chicago Sun Times* newspaper reported that
10 Mr. Kennedy entered into an agreement with consulting firm AKPD Message and Media
11 ("AKPD"), had "already shot his first TV commercial," and had entered into an
12 agreement with Anzalone Liszt Research, a survey research firm. Complaint at 1.
13 Mr. Daley alleges that the hiring of these two "prominent" firms suggests that
14 Mr. Kennedy incurred expenditures in excess of \$5,000 and should be considered a
15 candidate under the Act, with the obligation to file a Statement of Candidacy and
16 Registration with the Commission. Complaint at 2.

17 An individual becomes a candidate for federal office – and thus triggers
18 registration and reporting under the Act – when he or she has received or made in excess
19 of \$5,000 in contributions or expenditures, at which point he or she has fifteen days to
20 designate a principal campaign committee by filing a Statement of Candidacy with the
21 Commission. 2 U.S.C. §§ 431(2) and 432(e)(1). The principal campaign committee
22 must then file a Statement of Organization within ten days of its designation as principal
23 campaign committee. 2 U.S.C. § 433(a).

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1 However, an individual who has not decided to run as a federal candidate may
2 "test the waters" before declaring candidacy. 11 C.F.R. §§ 100.72 and 100.131. The
3 testing the waters exemption permits an individual to test the feasibility of a campaign for
4 federal office without becoming a candidate and triggering registration and reporting
5 requirements under the Act. Under this exemption, an individual may raise and spend
6 funds in order to determine whether he should become a candidate. Testing the waters
7 activities include, but are not limited to, conducting polls, making telephone calls, and
8 traveling. *Id.*

9 The Commission has emphasized the narrow scope of this exemption to the Act's
10 disclosure requirements. *See Explanation and Justification for Regulations on Payments*
11 *Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993 (1985) ("The
12 Commission has, therefore, amended the rules to ensure that the 'testing the waters'
13 exemptions will not be extended beyond their original purpose. Specifically, these
14 provisions are intended to be limited exemptions from the reporting requirements of the
15 Act . . ."); *see also* AO 1981-32 (Askew). The testing the waters "regulations seek to
16 draw a distinction between activities directed to an evaluation of the feasibility of one's
17 candidacy, as distinguished from conduct signifying that a private decision to become a
18 candidate has been made." *Id.* However, money raised and spent solely to "test the
19 waters" does not count towards the dollar threshold until the individual decides to run for
20 federal office or conducts activities that indicate he has decided to become a candidate.

21 Activities indicating an individual has decided to become a candidate include:
22 (1) the use of general public political advertising to publicize an intention to run for
23 office; (2) raising funds in excess of what could reasonably be expected to be used for

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1 exploratory activities or undertaking activity designed to amass campaign funds that
2 would be spent after becoming a candidate; (3) making or authorizing statements
3 referring to him or herself as a candidate; (4) conducting activity in close proximity to the
4 election or over a protracted period of time; and (5) taking action to qualify for the ballot
5 under state law.¹ See 11 C.F.R. §§ 100.72(b) and 100.131(b).

6 The response indicates that much of the information relied on by Mr. Daley to
7 show that Mr. Kennedy was a federal candidate is false. Response at 1. Specifically, the
8 response states that Mr. Kennedy had discussions with partners of AKPD, but
9 "Mr. Kennedy has not paid or agreed to pay AKPD any consulting fees in connection
10 with these meetings." *Id.* Further, the response states that AKPD did not produce a TV
11 commercial for Mr. Kennedy, and Mr. Kennedy had not made any expenditures under the
12 Act. Rather, Mr. Kennedy "commissioned a poll to assess his name recognition and
13 viability as a candidate." Response at 3. The response also includes an affidavit from
14 Craig Dooley, who identifies himself as a friend and advisor to Mr. Kennedy. In his
15 affidavit, Mr. Dooley indicates that "AKPD has not produced a television commercial for
16 Mr. Kennedy" and it is his understanding that "Mr. Kennedy intends to pay for the cost of

¹ Recently, the Commission indicated that various activities "that tested the boundaries of the testing the waters exemption" still stayed within its ambit. See MUR 5934 Statement of Reasons (Sen. Thompson's "ambiguous" statements regarding his candidacy and the signing of a long-term lease reportedly for campaign headquarters still fell within the testing the waters exemption). Similarly, "conditional statements of candidacy," based upon whether the incumbent retired, were insufficient to establish that Kirk Schuring had "definitively decided to become a federal candidate," even when Mr. Schuring filed his Statement of Candidacy the day after the incumbent announced his retirement. See MUR 5930 Statement of Reasons.

In a third case, the Commission's voted 3-3 as to whether there was reason to believe Kieran Michael Lalor and his committee violated the Act by failing to timely file a Statement of Candidacy, a Statement of Organization, and a quarterly disclosure report based on information that Mr. Lalor had raised at least \$20,000 and made public statements in news articles, on his website, and in a paid advertisement in a New York Conservative party dinner program, referring to both "my candidacy" and "my campaign." See MUR 5945 Statement of Reasons of Commissioner Weintraub and Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn.

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the poll with personal or other federally permissible funds." Dooley Affidavit at Paragraphs 2 and 5. A supplemental response indicates that on August 18, 2009, Mr. Kennedy announced that he would not run for the United States Senate.

It does not appear that Mr. Kennedy engaged in any of the activities enumerated in the Commission's regulations that would lead to a conclusion that he may have gone beyond testing the waters and had become a candidate. There is no information that Mr. Kennedy: 1) used general public political advertising to publicize his intention to campaign for Federal office; 2) raised funds in excess of what could reasonably be expected to be used for exploratory activities or undertook activities designed to amass campaign funds that would be spent after he became a candidate; 3) made or authorized written or oral statements that referred to him as a candidate for a particular office; 4) conducted activities in close proximity to the election or over a protracted period of time; or 5) took action to qualify for the ballot under State law. *See* 11 C.F.R. §§ 100.72 and 100.131.

The "article" cited in the complaint may more accurately be described as a column containing a mixture of information gleaned from unnamed sources and predictions regarding the future. While the column suggests that Mr. Kennedy "hired a production company and film crew" and had "already shot his first TV commercial," it provides no source for this information. In addition, the response indicates that AKPD has not "produced a television advertisement for Mr. Kennedy." The complaint was not completely clear with respect to whether another consulting firm produced a commercial for Mr. Kennedy; however, even assuming that the commercial was produced, there is no dispute that it never aired.

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1 The response indicates that Mr. Kennedy and his personal advisors participated in
2 several meetings with partners of AKPD to discuss "the logistics of becoming a candidate
3 and running a campaign, the viability of his candidacy, and potential strategy should he
4 choose to run for office." Response at 3. The response further states that "Mr. Kennedy
5 has not paid or agreed to pay AKPD any consulting fees in connection with these
6 meetings." Response at 1. Mr. Kennedy also commissioned a poll "to assess his name
7 recognition and viability as a candidate," and spoke with consultants. These activities all
8 appear to fall within the testing the waters exemption of 11 C.F.R. §§ 100.72 and
9 100.131.

10 Furthermore, the supplemental response indicates that Mr. Kennedy announced
11 on August 18, 2009 that he would not run for the United States Senate. While there is no
12 information that any of Mr. Kennedy's activities fell outside of the testing the waters
13 exemption when they occurred, this fact is consistent with the claim that Mr. Kennedy
14 had never made a decision to become a candidate and, therefore, had no obligation to file
15 a Statement of Candidacy and Registration with the Commission.

16 Because there is no information to suggest that Mr. Kennedy's activities fell
17 outside the testing the waters exemption of 11 C.F.R. §§ 100.72 and 100.131, we
18 recommend that the Commission find no reason to believe that Mr. Kennedy violated
19 2 U.S.C. § 432(e)(1) and close the file.

20 **III. RECOMMENDATIONS**

- 21 1. Find no reason to believe Christopher Kennedy violated 2 U.S.C.
22 § 432(e)(1);
- 23 2. Approve the attached Factual and Legal Analysis;

3. Approve the appropriate letter;

4. Close the file.


Thomasenia P. Duncan
General Counsel

10/29/09
Date

BY:


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